UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

John Doe,

Plaintiff,

v.

University of St. Thomas,

Defendant.

Case No. 16-cv-1127-ADM-KMM

ORDER

Beau D. McGraw, Esq., McGraw Law Firm, PA, counsel for the plaintiff.

David A. Schooler, Esq., Ellen A. Brinkman, Esq., and Michael M. Sawers, Esq., Briggs & Morgan, PA, counsel for the defendant.

The plaintiff, John Doe, has filed a Motion to Proceed Pseudonymously in the above-captioned proceeding. (ECF 16) That request is opposed by the defendant, University of St. Thomas. For the reasons set forth below, the plaintiff's Motion is granted for now.

The Federal Rules of Civil Procedure require pleadings to contain the names of all parties. Fed. R. Civ. P. 10(a). This creates a presumption in favor of publicly identified litigants proceeding under their true names, and against pseudonymous proceedings. *See, e.g.*, *Luckett v. Beaudet*, 21 F. Supp. 2d. 1029, 1029 (D. Minn. 1998)("There is a strong presumption against allowing parties to use a pseudonym.")

Predictably, there are exceptions to Rule 10(a) and countervailing considerations can overcome the presumption. "In cases involving intensely personal matters, 'the normal practice of disclosing the parties' identities yields to a policy of protecting privacy.'" *In re Ashley Madison Customer Data Security Breach Litig.*, MDL No.

2669, 2016 WL 1366616, at * 3 (E.D. Mo. Ap. 6, 2016)(quoting *Southern Methodist Univ. Assoc. of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712 (5th Cir. 1979)). Although there is no authority from either the Eighth Circuit or the Supreme Court to guide the Court, *see In re Ashley Madison*, 2016 WL 1366616, at * 1, other courts have highlighted various factors relevant to assessing the propriety of unnamed litigants. *See, e.g.*, *Roe v. St. Louis Univ.*, No. 4:08-cv-14746, 2009 WL 910738, at *3 (E.D. Mo., April 2, 2009)(collecting cases).

Many courts have referenced three considerations seemingly first identified by the Eleventh Circuit: whether the plaintiffs challenge governmental activity; whether the lawsuit requires the plaintiffs to disclose "information of the utmost intimacy;" and whether the plaintiffs would be required to admit their intention to engage in illegal conduct, which could expose them to criminal prosecution. *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992)(affirming lower court's decision to deny pseudonymity in a case where plaintiff's alcoholism would be publicly disclosed); *see also Luckett*, 21 F. Supp. 2d at 1029 (applying the *Doe v. Frank* factors).

The Second Circuit, after considering decisions from courts around the country, identified several more factors to be weighed in striking the right balance between privacy and sunshine:

> (1) whether the litigation involves matters that are highly sensitive and of a personal nature; (2) whether identification poses a risk of retaliatory physical or mental harm to the party seeking to proceed anonymously or even more critically, to innocent non-parties; (3) whether identification presents other harms and the likely severity of those harms, including whether the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity; (4) whether the plaintiff is particularly vulnerable to the possible harms of disclosure, particularly in light of his age; (5) whether the suit is challenging the actions of the government or that of private parties; (6) whether the defendant is prejudiced by allowing the plaintiff to press his claims anonymously, whether the nature of that prejudice (if any) differs at any particular stage of the litigation, and whether any prejudice can be mitigated by the district court; (7) whether the plaintiff's identity has thus far been kept

> confidential; (8) whether the public's interest in the litigation is furthered by requiring the plaintiff to disclose his identity; (9) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities; and (10) whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff.

Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 189-90 (2d Cir. 2008) (internal citations and quotations omitted). Although it is difficult to imagine a more exhaustive iteration, the *Sealed v. Sealed* court cautioned that still additional factors "relevant to the particular case under consideration" should be weighed where appropriate. *Id.*

With this guidance in mind, the Court turns to whether *this* plaintiff in *this* case should be allowed to continue his lawsuit against his school as John Doe. Mr. Doe has sued the University of St. Thomas claiming, in essence, that the school's decision to suspend him for sexual misconduct violated his rights under federal law. For several reasons, he will be permitted to continue pseudonymously, at least for now.

First, the matters at issue are of a "highly sensitive" and personal nature, indeed are matters of "utmost intimacy." *See, e.g., Luckett*, 21 F. Supp. 2d at 1029. The complaint and its supporting documents describe very private sexual acts, whether consensual or not, between two young college students, and it is difficult to imagine any resolution of this case without further exploration of truly intimate matters. Numerous courts, considering similar cases, have allowed plaintiffs to proceed pseudonymously in large part because of the very intimate nature of the claims at issue. *See, e. g.*, *Doe v. Colgate Univ.*, No. 5:15-cv-1069, 2016 WL1448829, at *3-4 (N.D.N.Y. Ap. 12, 2016)(allowing pseudononym in case involving university's handling of sexual assault claim against plaintiff and collecting cases reaching the same result); *Doe v. the Rector and Visitors of George Mason Univ.*, __ F. Supp. 3d __, 2016 WL 1574045, *7 (E.D. Va. Ap. 14, 2016) ("There can be no doubt that the litigation here focuses on a 'matter of a sensitive and highly personal nature.'").

More critically in this case, "the injury litigated against would be incurred as a result of disclosure of the plaintiff's identity." *Sealed v. Sealed*, 537 F.3d at 189. Among the injuries of which Mr. Doe complains is the damage done to his reputation and future prospects by what he describes as a flawed process for assessing allegations of sexual assault at the University of St. Thomas. Even if his lawsuit were successful and his claims of unfair treatment were vindicated down the road — an outcome about which the Court offers no opinion of likelihood — the complained-of damage to Mr. Doe's reputation would be perhaps unfixable if his identity is known. "If [Doe] were not allowed to proceed anonymously, part of the relief he seeks — expungement of his school record — would fall short of making him whole. The cat would have already been let out of the bag." *Doe v. Alger*, __ F.R.D. __ , 2016 WL1273250, at * 4 (W.D. Va. Mar. 31, 2016). Indeed, forcing Mr. Doe to proceed under his true name would guarantee a permanent label as a sexual offender, discoverable with a simple Google search; that is arguably worse than the reputational harm he complains of from the University's currently confidential disciplinary proceedings. This factor weighs heavily in favor of pseudonymous proceeding in this case.

Third, the University has not identified any harm or prejudice it will suffer, either publicly or in the litigation, if Mr. Doe is allowed to remain just that. *See, e.g.*, *Doe v. Colgate,* 2016 WL1448829, at *3 (noting an absence of harm to the defendant in support of granting pseudonymity). The University is aware of Mr. Doe's identity and can proceed with discovery despite the pseudonym in the caption of the lawsuit. The parties are even now drafting a protective order to protect the identity of Jane Doe, the alleged victim of Mr. Doe's misconduct, and the same protections can apply to the plaintiff. And, although the University of St. Thomas might prefer not to have to defend its internal discipline policies regarding claims of sexual assault in the public forum, it would have to do so regardless of Mr. Doe's anonymity. Indeed, even absent the lawsuit itself, universities everywhere are part of an ongoing public conversation regarding these issues on campus. *See, e.g.*, *Doe v. Brown Univ.*, 2016 WL 715794, at *1 (D.R.I. Feb. 22, 2016) ("This case concerns an issue that has been the subject of increasing attention and controversy, particularly in academia, and which has garnered much recent media and scholarly commentary.").

Fourth, public identification of Mr. Doe would expose him to a risk of "retaliatory harm." As a district court in Virginia noted when grappling with this issue in a similar case, "the mere accusation [of sexual misconduct], if disclosed, can invite harassment and ridicule. Moreover, it is possible that plaintiff could be targeted for "retaliatory physical or mental harm." *Doe v. George Mason Univ.*, 2016 WL 1574045, at *12-13 (internal citations omitted). Because the issues raised by Mr. Doe's complaint are so politically and emotionally charged, and the subject of intense focus and debate, the risk of harassment of either Mr. Doe or Jane Doe, if their names were revealed in this case, are a meaningful consideration.[1] Although this somewhat speculative concern does not control the analysis, it weighs in favor of granting Mr. Doe's motion.

A final factor weighing in favor of pseudonymity is that the public's interest in this litigation, and in the issues that underlie it, is not "furthered by requiring the plaintiff to disclose his identity." *Sealed v. Sealed*, 537 F.3d at 190; *see also Doe v. Megless*, 654 F.3d 404, 409 (3d Cir. 2011) (considering "whether, because of the subject matter of this litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigants' identities."). Here, the public is rightly interested in issues of sexual violence on campus, the response of schools to that violence, both generally and even in specific cases, and the use of litigation to address the alleged failures of that response. However, in general none of these ends are furthered by knowing which college student brought a particular lawsuit as

[1] This risk is not just theoretical. Not only have cases like these garnered significant attention, but *this* case has as well, being covered by multiple media outlets within days of the complaint being filed.

opposed to knowing simply that some college student did so. *See Doe v. George Mason Univ.*, 2016 WL 1574045, at *8 (noting that the public's interest is adequately vindicated where the public has access to the record in the case without knowing the identities of the alleged perpetrator or victim of sexual misconduct).

Two considerations highlighted by the University in opposition to Mr. Doe's motion merit specific mention. First, St. Thomas suggests that the conduct of plaintiff's counsel in the filing of the complaint should weigh against allowing the plaintiff to use a pseudonym in the litigation. Specifically, the University argues that plaintiff's counsel's inept redactions and attachment of one of Jane Doe's private medical records to the publicly filed complaint reflect an intent to expose Ms. Doe publicly and therefore Mr. Doe should not be able to proceed by pseudonym. But as explored at the hearing on St. Thomas' Emergency Motion to Strike, the record does not support a finding that Mr. Doe's counsel intended to reveal private information about Ms. Doe or to disclose her identity.[2] And, though parties can be held accountable for mistakes of their counsel, the University concedes that there is no reason to believe that Mr. Doe himself was in any way personally responsible for his counsel's failures to maintain the privacy of Ms. Doe. The redaction failures from two weeks ago do not control the question of pseudonymity.

Finally, the Court finds it difficult to reconcile the University of St. Thomas' repeated and genuine expressions of concern for the privacy of its students, including John and Jane, with its decision not to follow the course taken by other (though by no means all) universities and acquiesce to pseudononymous proceeding. *See, e.g.*, *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 375 n.1 (S.D.N.Y. Ap. 21, 2015)(noting that the university agreed to pseudonym "in light of the sensitive subject matter and the age of

[2] While counsel's ineffective redactions reflected ineptitude, the same poor redactions were employed by counsel to protect the identity of his own client as those used to hide the identity of Ms. Doe. It is difficult to credit a suggestion that counsel intentionally exposed his own client's identity while simultaneously fighting to protect it.

the students involved."); *Doe v. Univ. of Massachusetts-Amherst*, No. 14-cv-30143, 2015 WL 4306521 (D. Mass. July 28, 2015)(university consented to pseudonymity). Mr. Doe is a student at St. Thomas, though a suspended one, as is Ms. Doe. Her position as an alleged victim of sexual assault and a non-party to the litigation certainly merit her privacy. But it bears keeping in mind that Mr. Doe has not been convicted of or even charged with a crime, and he disagrees strongly that what passed between him and Ms. Doe was a non-consensual act. It is hard to draw a bright line between everyone's agreed interest in keeping Ms. Doe's identity out of the public eye and Mr. Doe's interest in achieving the same result for himself given the fact that no real adjudication of guilt ever occurred.

Here, the plaintiff urges that the accusations that he sexually assaulted a fellow student are the sort that "have a high likelihood of causing him irreparable harm for the rest of his life." (ECF 17, Pl.'s Mem.) It does not require speculation or surmise to realize that a young man found to have committed a non-consensual sexual act at a university — in an administrative proceeding requiring a preponderance of the evidence — could be permanently harmed by release of that information even if he later prevails in his challenge to the validity of the process that judged him guilty in the first place. This is particularly so in light of the highly charged attention being paid to issues of sexual assault and affirmative consent on campuses today.

In sum, whether students should be allowed to sue over their schools' sexual assault policies using a pseudonym does not admit of a universal answer. The question is left to the discretion of the Court to balance the many competing factors in individual cases, and courts around the country have struck that balance differently. *See, e.g.*, *Doe v. Temple Univ.*, 2014 WL 4375613, *2 (E.D. Pa. Sept. 3, 2014) (denying motion to proceed using a pseudonym). In this case, on the record now before the Court, the required analysis weighs in favor of allowing Mr. Doe to proceed by pseudonym. However, should that balance shift at a later stage in the proceedings, the University of St. Thomas is free to reopen the issue.

IT IS SO ORDERED.

Date: May 25, 2016

s/ Katherine Menendez
Katherine Menendez
United States Magistrate Judge